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Due Process--Requirement That a Prisoner Be "Duly Cautioned"

Charles David McMunn
West Virginia University College of Law

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to share in the estate of the deceased! If both wives are to share in the deceased's estate, the court is faced with the problem of determining how the women are to participate. Will they share equally or will one get a larger proportion than the other?

A statement by Clyde L. Colson, Dean of the West Virginia College of Law, summarizes exactly the state of West Virginia Law today because of the wording of this statute. Dean Colson stated that as the matter now stands it is impossible to deal with the situation logically and no relief can be had until the legislature sees fit to go back to the common law rule that bigamous marriages are void ab initio. He also stated that such a change would clear up the illogical muddle that the courts are now in. Colson, *West Virginia Marriage Law*, 43 W. VA. L.Q. 33, 51 (1936).

Thomas Franklin McCoy

Due Process—Requirement That a Prisoner Be "Duly Cautioned"

D was convicted of breaking and entering. After conviction and before sentencing, information setting forth two previous convictions was properly presented to the court. Pursuant to the provisions of the Habitual Criminal Act of West Virginia, W. VA. CODE ch. 61, art. 11, §§ 18, 19 (Michie 1961), the court sentenced *D* to confinement in the penitentiary for the remainder of his natural life. *D* filed a petition in the United States District Court for Northern West Virginia praying for a writ of habeas corpus. An order was entered by that court quashing the writ and dismissing the petition. *Held*, reversed. Where the prisoner was not duly cautioned prior to the admission of his identity and prior to the imposition of the life sentence, "due process of law" was denied and the sentence imposed under the statute is void. *Spry v. Boles*, 299 F.2d 332 (4th Cir. 1962).

The Congress of the United States has given to the federal courts the power to grant a writ of habeas corpus. Judiciary and Judicial Procedure Act, 28 U.S.C. § 2241 (1959). However, this power will only inure to the benefit of a prisoner under certain circumstances. The Judiciary and Judicial Procedure Act, 28 U.S.C. § 2241(c) (3) (1959) provides that the prisoner shall not have the benefit of the writ unless he is in custody in violation of the Constitution or laws or treaties of the United States. When a federal court declares that an act is done without due process of law, its

reference is to due process of law as guaranteed by the Constitution of the United States. The principal case declares that *D* was denied due process of law but the court cites no federal authority for its holding. This case thus appears to have established a rather unique due process rule.

The denial of due process in the principal case came in the form of a failure on the part of the trial court to "duly caution" *D*. The Habitual Criminal Act of West Virginia, W. VA. CODE ch. 61, art. 11, § 19 (Michie 1961), states that after conviction and before sentencing, the prosecuting attorney shall file information relating to the prisoner's previous record. The court shall then require the prisoner to say whether he is the same person or not. ". . . after being duly cautioned, if he acknowledged in open court that he is the same person, the court shall sentence him to such further confinement as is prescribed. . . ." (Emphasis added.)

When the Supreme Court of Appeals of West Virginia interpreted the nature of due process of law under the West Virginia Constitution, W. VA. CONST. art. III, § 10, the court adopted the words of Mr. Justice Edwards in *Westervelt v. Gregg*, 12 N.Y. 217 (1854). In essence, Justice Edwards stated that in order to afford one due process of law, those rules and forms which have been established for the protection of private rights must be accorded in the due course of legal proceedings. *Peerce v. Kitzmiller*, 19 W. Va. 564, 578 (1882). The West Virginia Court has also held, as a matter of state requirement, that the provisions of section 19 of the Habitual Criminal Act are mandatory for a valid imposition of further sentence under the statute. *State ex rel. Cox v. Boles*, 120 S.E.2d 707 (W. Va. 1961). Duly cautioning being a requirement, it would seem to follow that the prisoner has been granted a right which, if denied, would be a violation of state due process of law.

The denial of state due process by a state tribunal does not of necessity raise a question of the denial of federal due process for which a federal court may grant a writ of habeas corpus. "There may have been some error in the state court practice and procedure, but the federal court is only interested in whether there has been a denial of due process as guaranteed by the federal constitution." *Owsley v. Cunningham*, 190 F.Supp. 608, 611 (E.D. Va. 1961). Thus, when the court in the principal case exercised its jurisdiction and granted the writ of habeas corpus, it appears to have established that duly cautioning is a federally guaranteed right.

The principal case was decided February 13, 1962. No federal authority was cited for this holding and the court did not establish any requirements which are necessary to satisfy the federal guarantee that one be duly cautioned. On June 26, 1962, the Supreme Court of Appeals of West Virginia rendered a decision enunciating the state requirements of duly cautioning under the Habitual Criminal statute. *State ex rel, Mounts v. Boles*, 126 S.E.2d 393 (W. Va. 1962). However, this case and the requirements therein could not have been the basis upon which the principal case was decided since its holding was asserted after that of the principal case. In consequence, the present federal requirements with regard to this newly guaranteed federal right are not yet clear.

Consider the hypothetical situation in which *X*, a defendant, has committed a crime in another state jurisdiction and has been taken to trial. At some stage of the proceedings, a state statutory requirement compels the court to "duly forewarn" *X* before receiving his answer. If that state has previously interpreted the meaning of the words "duly forewarn", will the federal courts incorporate that interpretation as the requirement for federal due process of law thereby making federal due process correspond to each particular state's interpretation of its own statute? If such a method is used, a conflict is created by the fact that the principal case pronounced that *D* had been denied federal due process of law before the Supreme Court of Appeals of West Virginia had interpreted the meaning of the term "duly cautioned". As an alternative, will the federal courts initiate a standard which will apply to all state statutes using terms such as "duly caution", "duly admonish", and "duly forewarn" when determining if federal due process of law has been denied? If such a procedure is undertaken, will each state's interpretation of its own statute be compatible with the federal interpretation or will there be one rule of due process on the state level and another on the federal level?

These questions illustrate the possible issues presented by the decision in the principal case. While to be "duly cautioned" now appears to be a federally guaranteed right by the authority of this holding, it is not altogether clear just what that right may be or just how far its scope will extend.

Charles David McMunn